

ALEXANDER B. TRUEBLOOD (TX Bar No. 24100609)

TRUEBLOOD LAW FIRM

700 Lavaca Street, Suite 1400

Austin, TX 78701-3102

Telephone: (512) 537-0388

Facsimile: (512) 582-8516

Email: alec@hush.com

Attorneys for Plaintiff

RONALD MENDLESKI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

RONALD MENDLESKI,

Plaintiff,

vs.

LOBEL FINANCIAL
CORPORATION, RYAN PECK DBA
SUPERIOR AUTO RECOVERY, and
BURNS NATIONAL, LLC,

Defendants.

Case No: 4:17-CV-1443

**FIRST AMENDED COMPLAINT
FOR:**

**(1) VIOLATIONS OF THE FAIR
DEBT COLLECTION PRACTICES
ACT**

**(2) VIOLATIONS OF THE
UNIFORM COMMERCIAL CODE**

(3) BREACH OF CONTRACT

**(4) VIOLATIONS OF THE TEXAS
MOTOR VEHICLE
INSTALLMENT SALES ACT**

1 Plaintiff Ronald Mendleski hereby complains against defendants Ryan Peck
2 dba Superior Auto Recovery (“Superior”), Burns National, LLC (“Burns”), and
3 Lobel Financial Corporation (“Lobel”), and alleges on information and belief as
4 follows:

5 **OPERATIVE FACTS**

6 1. Plaintiff purchased a vehicle from Champion Auto Sales, an auto
7 dealer located in Corpus Christi, Texas, primarily for personal, family or household
8 use, and signed a retail installment sales contract which gave the dealership a
9 security interest in the vehicle. The dealership assigned the retail installment sale
10 contract and security interest to defendant Lobel. Plaintiff subsequently fell behind
11 on the contract payments.

12 2. Defendant Lobel hired defendant Burns as its agent to repossess
13 plaintiff’s vehicle. Defendant Burns then hired defendant Superior as its agent, to
14 physically take the car. Superior repossessed plaintiff’s vehicle by entering
15 plaintiff’s secured and gated apartment complex, without permission. Accordingly,
16 defendants breached the peace during the repossession, in violation of Texas Bus.
17 & Commerce Code § 9.609(b)(2).

18 3. On or about December 3, 2016, Defendant Lobel mailed plaintiff a
19 written notice of sale (“NOI”), dated December 2, 2016, which stated that
20 plaintiff’s vehicle would be sold sometime after December 18, 2016, and that
21 plaintiff could reinstate his contract within 15 days of the date of the notice.
22 However, plaintiff is informed and believes that defendant Lobel sold plaintiff’s
23 vehicle on or before December 18, 2016, the date guaranteed in the NOI.
24 Defendant Lobel therefore did not give reasonable notice of the sale, failed to
25 conduct a commercially reasonable sale, and deprived plaintiff of his right to
26 reinstate and redeem the collateral, all in violation of Texas Bus. & Commerce
27 Code §§ 9.610(b), 9.611(b), 9.612(a), and 9.623.

28 4. Defendant Lobel sold plaintiff’s vehicle, and assessed plaintiff a

1 deficiency balance of \$4,639.21. Lobel then sent plaintiff an explanation of the
2 deficiency, which violated Texas Bus. & Comm. Code § 9.616(b)(1) in the
3 following ways:

4 (a) in violation of Texas Bus. & Comm. Code § 9.616(c)(1), the notice
5 disclosed a rebate of unearned interest out of the statutorily mandated order, i.e.
6 after the amount of sales proceeds and amount owing after application of the sales
7 proceeds, instead of before;

8 (b) in violation of Texas Bus. & Comm. Code § 9.616(c)(5), the notice
9 disclosed a GAP finance charge rebate out of the statutorily mandated order, i.e.
10 before instead of after the types and amounts of expenses associated with selling
11 the vehicle.

12 (c) in violation of Texas Bus. & Comm. Code § 9.616(c)(5), the notice failed
13 to disclose that plaintiff was entitled to a credit for the unearned premiums on his
14 canceled GAP insurance contract.

15 5. As a result of the above UCC violations, plaintiff does not owe
16 defendant Lobel a deficiency balance, by operation of Texas Bus. & Comm. Code §
17 9.626(b). Plaintiff is also entitled to damages and statutory damages pursuant to
18 Texas Bus. & Comm. Code § 9.625(b) and (c).

19 6. Plaintiff had personal possessions in the vehicle. In violation of Texas
20 Occupations Code § 2303.151, defendant Superior failed to mail plaintiff a notice
21 by certified mail, stating the information required by Tex. Occup. Code § 2303.153,
22 including the amounts of storage and other charges plaintiff would have to pay
23 when the vehicle was claimed, and the location of the storage facility.

24 7. In violation of Texas Finance Code § 348.407 (and in breach of
25 contract), defendant Lobel failed to issue plaintiff a written notice within 15 days of
26 discovering that there was personal property in the vehicle, informing plaintiff of
27 the address and business hours of the entity who was storing plaintiff's possessions,
28 so he could reclaim them. Lobel falsely disclosed to plaintiff in its NOI, that

1 defendant Burns was storing the vehicle in Michigan, when in fact defendant
2 Superior or some other entity had custody of the vehicle, and plaintiff's
3 possessions, in Texas.

4 **JURISDICTION AND VENUE**

5 8. The court has original jurisdiction over this matter pursuant to 15
6 U.S.C. § 1692k(d). The court has supplemental jurisdiction over the state law
7 claims pursuant to 28 U.S.C. § 1367.

8 9. Venue is proper in the Southern District of Texas because a substantial
9 part of the events or omissions giving rise to the claim occurred in this district, and
10 defendants are subject to the court's personal jurisdiction in this district.

11 **PARTIES**

12 10. Plaintiff is a natural person over the age of 18 years and is a resident of
13 Corpus Christi, Texas.

14 11. Defendant Ryan Peck is an individual who does business as Superior
15 Auto Recovery, and plaintiff is informed and believes he is a resident of Corpus
16 Christi, Texas.

17 12. Defendant Burns National, LLC is a Michigan limited liability
18 company with its headquarters in Hudsonville, Michigan.

19 13. Defendant Lobel Financial Corporation is a California corporation
20 with its headquarters in Anaheim, California.

21 14. At all times mentioned herein, each defendant was the agent or
22 employee of each of the other defendants and was acting within the course and
23 scope of such agency or employment. The defendants are jointly and severally
24 liable to plaintiff.

25 **FIRST CAUSE OF ACTION**

26 **(Against Defendants Superior and Burns for Violations of the Fair Debt
Collection Practices Act, 15 U.S.C. § 1692 et seq.).**

27 15. Plaintiff realleges and incorporates herein by reference the allegations
28 of all paragraphs above.

1 16. Plaintiff is a “consumer” who allegedly owed a “debt”, and defendants
2 are “debt collectors”, as those terms are defined at 15 U.S.C. § 1692a. Defendants
3 use instrumentalities of interstate commerce or the mails in a business the principal
4 purpose of which is the enforcement of security interests.

5 17. Defendants violated 15 U.S.C. § 1692f(6) by taking nonjudicial action
6 to effect dispossession or disablement of property when (1) there was no present
7 right to possession of the property claimed as collateral through an enforceable
8 security interest; and/or (2) the property was exempt by law from such
9 dispossession or disablement.

10 18. Defendants had no present right to repossess plaintiff’s vehicle in
11 breach of the peace, but did so in violation of Texas Bus. & Commerce Code §
12 9.609(b)(2).

13 19. Plaintiff is entitled to actual damages sustained as a result of
14 defendants’ conduct, in an amount according to proof, pursuant to 15 U.S.C. §
15 1692k.

16 20. Plaintiff is entitled to statutory damages of \$1,000 against each
17 defendant, pursuant to 15 U.S.C. § 1692k. Defendants have frequently and
18 persistently failed to comply with the FDCPA, and have violated the FDCPA
19 intentionally. The nature of defendants’ violations justifies the maximum statutory
20 damages award available.

21 21. Plaintiff is entitled to the costs of the action, together with a reasonable
22 attorneys fee, pursuant to 15 U.S.C. § 1692k.

23 WHEREFORE, plaintiff prays for relief as set forth below.

24 **SECOND CAUSE OF ACTION**
25 **(Against Defendant Lobel for Violations of the Uniform Commercial Code)**

26 22. Plaintiff realleges and incorporates herein by reference the allegations
27 of all paragraphs above.

28 23. Defendant violated Texas Bus. & Commerce Code §§ 9609(b),

1 9.610(b), 9.611(b), 9.612(a), 9616, and 9.623, as set forth above.

2 24. Plaintiff is entitled to recover the actual damages caused by
3 defendant's failure to comply with the Uniform Commercial Code, pursuant to
4 Texas Bus. & Commerce Code §§ 9.625(b) and (c)(1).

5 25. Plaintiff is entitled to recover the credit service charge plus ten percent
6 of the principal amount of the obligation, pursuant to Texas Bus. & Commerce
7 Code § 9.625(c)(2).

8 26. Plaintiff is entitled to an injunction pursuant to Texas Bus. &
9 Commerce Code §§ 9.625(a), to restrain defendant from collecting any deficiency
10 balance from plaintiff, including making any credit reporting that plaintiff owes a
11 deficiency or that his account has been charged off.

12 27. By repossessing plaintiff's vehicle in breach of the peace, defendants
13 also breached the terms of the retail installment sales contract. Plaintiff is entitled to
14 recover attorneys fees and costs pursuant to the terms of the contract, and
15 applicable law, including Texas Civil Practice And Remedies Code § 38.001(8).

16 WHEREFORE, plaintiff prays for relief as set forth below.

17 **THIRD CAUSE OF ACTION**
18 **(Against Defendant Lobel for Breach of Contract)**

19 28. Plaintiff realleges and incorporates herein by reference the allegations
20 of all paragraphs above.

21 29. In its written contract with plaintiff, Lobel's assignor promised that if
22 plaintiff defaulted, "We may immediately take possession of the property by legal
23 process or self-help, but in doing so we may not breach the peace or unlawfully
24 enter onto your premises." Defendant Lobel breached this promise when it
25 breached the peace during the repossession, and unlawfully entered onto plaintiff's
26 premises.

27 30. In its written contract with plaintiff, Lobel's assignor promised that if
28 it retook possession of the vehicle, "You agree that if any notice is required to be

1 given to you of an intended sale or transfer of the Property, notice is reasonable if
2 mailed to your last known address, as reflected in our records, at least ten days
3 before the date of the intended sale or transfer (or such other period of time as is
4 required by law.” Defendant Lobel breached this promise when it failed to give at
5 least ten days notice of the sale, and failed to permit the period of time required by
6 law to elapse, before selling the vehicle.

7 31. In its written contract with plaintiff, Lobel’s assignor promised that
8 “You agree that we may take possession of personal property left in or on the
9 Property securing the Contract and taken into possession as provided above. We
10 will send you written notice at your last known address within 15 days of our
11 discovery of such personal property. If you fail to claim that property as provided
12 in the notice, we may dispose of that property and disburse the proceeds, according
13 to applicable law.” Defendant breached this promise when it failed to send plaintiff
14 written notice of the location of his personal items, within 15 days of discovering
15 that personal property had been recovered.

16 32. As a proximate result of defendant’s breach of contract, plaintiff has
17 suffered damages, and is entitled to recover them from defendant.

18 33. Plaintiff is entitled to recover attorneys fees and costs pursuant to
19 Texas Civil Practice And Remedies Code § 38.001(8).

20 **FOURTH CAUSE OF ACTION**
21 **(Against Defendant Lobel For Violations Of The Texas Motor Vehicle**
22 **Installment Sales Act, Texas Fin. Code § 348.001 et seq.)**

23 34. Plaintiff realleges and incorporates herein by reference the allegations
24 of all paragraphs above.

25 35. Defendant violated Texas Finance Code § 348.407, by failing to issue
26 plaintiff a notice within 15 days of discovering that there was personal property in
27 the vehicle, which informed plaintiff of the information required by that section.

28 36. Plaintiff is entitled to recover three times his actual economic loss
caused by defendant’s violations, pursuant to Texas Finance Code § 349.003(a)(1).

37. Plaintiff is entitled to reasonable attorneys' fees, pursuant to Texas Finance Code § 349.003(b).

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. For actual damages, including economic harm and mental anguish;
2. For statutory damages;
3. For treble damages;
4. For injunctive relief;
5. For pre-judgment interest to the extent permitted by law;
6. For an award of attorneys' fees, costs and expenses incurred in the investigation, filing and prosecution of this action; and
7. For such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury under the United States and Texas constitutions.

Dated: June 1, 2017

Respectfully Submitted,
TRUEBLOOD LAW FIRM

By: /s/
Alexander B. Trueblood

Attorney-In-Charge for Plaintiff
RONALD MENDLESKI

TX Bar No. 24100609
SD TX Bar No. 2789549
700 Lavaca Street, Suite 1400
Austin, TX 78701-3102
Telephone: (512) 537-0388
Facsimile: (512) 582-8516